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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 CARLA M. SCOTT,)
7 Plaintiff,) No. CV-09-305-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on January 7, 2011 (Ct. Rec. 18,
15 22). Attorney Maureen J. Rosette represents plaintiff; Special
16 Assistant United States Attorney Nancy A. Mishalanie represents
17 the Commissioner of Social Security (Commissioner). The parties
18 have consented to proceed before a magistrate judge (Ct. Rec. 7).
19 On August 30, 2010, plaintiff filed a reply (Ct. Rec. 24). After
20 reviewing the administrative record and the briefs filed by the
21 parties, the court **GRANTS** defendant's motion for summary judgment
22 (**Ct. Rec. 22**) and **DENIES** plaintiff's motion for summary judgment
23 (Ct. Rec. 18).

24 **JURISDICTION**

25 Plaintiff protectively applied for disability insurance
26 benefits (DIB) and supplemental security income (SSI) on November
27 16, 2007, alleging disability beginning July 6, 2007 (Tr. 118-
28

1 124). The applications were denied initially and on
2 reconsideration (Tr. 81-84, 91-94).

3 At a hearing before Administrative Law Judge (ALJ) R. S.
4 Chester on June 9, 2009, plaintiff, represented by counsel, and a
5 vocational expert testified (Tr. 36-69). On June 26, 2009, the ALJ
6 issued an unfavorable decision (Tr. 16-29). The Appeals Council
7 denied Ms. Scott's request for review on September 8, 2009 (Tr. 1-
8 3). The ALJ's decision became the final decision of the
9 Commissioner, which is appealable to the district court pursuant
10 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
11 review pursuant to 42 U.S.C. § 405(g) on October 1, 2009 (Ct. Rec.
12 1,4).

13 **STATEMENT OF FACTS**

14 The facts have been presented in the administrative hearing
15 transcript, the ALJ's decision, and the briefs of the parties.
16 They are briefly summarized here.

17 Plaintiff was 36 years old at the hearing (Tr. 38). She left
18 school in the tenth or eleventh grade and earned a GED in 2001.
19 She is divorced and lives with her two children, ages 22 months
20 and nine years at the time of the hearing (Tr. 39, 56, 181, 263,
21 384). Her daughter has several health problems requiring close
22 monitoring (Tr. 55-56). Plaintiff last worked in July 2007 as an
23 assistant manager at a dry cleaning business (Tr. 44, 145). She
24 has worked as a daycare aide, cashier, launderer, furniture
25 refinisher, telemarketer, and office assistant (Tr. 42, 61-63,
26 134, 145, 177, 263). Plaintiff testified walking is very painful
27 and requires using a prescribed cane. She has pain in her back,
28 hips, leg, knees, neck, and left shoulder blade (Tr. 44-46, 52,

57). She suffers depression ("a little depressed")(Tr. 52) but no one has recommended mental health counseling (Tr. 57). Plaintiff can walk 1-2 blocks, sit 20-30 minutes, stand 10 minutes, and lift ten pounds or less (Tr. 47, 49). She is unable to squat, drives only when necessary, reads with her children, and naps twice daily for two hours total. Pain causes sleep problems (Tr. 48, 50-52, 136).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,

1 the decision maker proceeds to step two, which determines whether
2 plaintiff has a medically severe impairment or combination of
3 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

4 If plaintiff does not have a severe impairment or combination
5 of impairments, the disability claim is denied. If the impairment
6 is severe, the evaluation proceeds to the third step, which
7 compares plaintiff's impairment with a number of listed
8 impairments acknowledged by the Commissioner to be so severe as to
9 preclude substantial gainful activity. 20 C.F.R. §§

10 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,
11 App. 1. If the impairment meets or equals one of the listed
12 impairments, plaintiff is conclusively presumed to be disabled.

13 If the impairment is not one conclusively presumed to be
14 disabling, the evaluation proceeds to the fourth step, which
15 determines whether the impairment prevents plaintiff from
16 performing work which was performed in the past. If a plaintiff is
17 able to perform previous work, that Plaintiff is deemed not
18 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
19 this step, plaintiff's residual functional capacity (RFC)
20 assessment is considered. If plaintiff cannot perform this work,
21 the fifth and final step in the process determines whether
22 plaintiff is able to perform other work in the national economy in
23 view of plaintiff's residual functional capacity, age, education
24 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
25 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

26 The initial burden of proof rests upon plaintiff to establish
27 a *prima facie* case of entitlement to disability benefits.

28 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

1 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
2 met once plaintiff establishes that a physical or mental
3 impairment prevents the performance of previous work. *Hoffman v.*
4 *Heckler*, 785 F.3d 1423, 1425 (9th Cir. 1986). The burden then
5 shifts, at step five, to the Commissioner to show that (1)
6 plaintiff can perform other substantial gainful activity and (2) a
7 "significant number of jobs exist in the national economy" which
8 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
9 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

10 STANDARD OF REVIEW

11 Congress has provided a limited scope of judicial review of a
12 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
13 the Commissioner's decision, made through an ALJ, when the
14 determination is not based on legal error and is supported by
15 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
16 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9th Cir. 1999). "The
17 [Commissioner's] determination that a plaintiff is not disabled
18 will be upheld if the findings of fact are supported by
19 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
20 Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is
21 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
22 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
23 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
24 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
25 573, 576 (9th Cir. 1988). Substantial evidence "means such
26 evidence as a reasonable mind might accept as adequate to support
27 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
28 (citations omitted). "[S]uch inferences and conclusions as the

1 [Commissioner] may reasonably draw from the evidence" will also be
2 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
3 review, the Court considers the record as a whole, not just the
4 evidence supporting the decision of the Commissioner. *Weetman v.*
5 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
6 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

7 It is the role of the trier of fact, not this Court, to
8 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
9 evidence supports more than one rational interpretation, the Court
10 may not substitute its judgment for that of the Commissioner.
11 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
12 (9th Cir. 1984). Nevertheless, a decision supported by substantial
13 evidence will still be set aside if the proper legal standards
14 were not applied in weighing the evidence and making the decision.
15 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
16 433 (9th Cir. 1987). Thus, if there is substantial evidence to
17 support the administrative findings, or if there is conflicting
18 evidence that will support a finding of either disability or
19 nondisability, the finding of the Commissioner is conclusive.
20 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

21 ALJ'S FINDINGS

22 The ALJ found plaintiff is insured through December 31, 2012
23 for DIB purposes (Tr. 16, 18). At step one he found Ms. Scott has
24 not engaged in substantial gainful activity since onset (Tr. 18).
25 At steps two and three, he found she suffers from degenerative
26 disc disease (DDD) of the cervical and lumbar spine, impairments
27 that are severe but which do not alone or in combination meet or
28 medically equal a Listed impairment (Tr. 18, 21). The ALJ found

1 plaintiff less than fully credible (Tr. 24) and assessed an RFC
2 for a range of light work (Tr. 21-22). At step four, he found she
3 is able to perform her past work as a cashier, call center clerk,
4 office helper, and teacher's aide (Tr. 27). The ALJ found
5 plaintiff was not disabled as defined by the Social Security Act
6 during the relevant period (Tr. 29).

7 **ISSUES**

8 Plaintiff contends the Commissioner erred when he weighed the
9 evidence of mental and physical impairment, specifically the
10 opinions of examining professionals Dennis Pollack, Ph.D., and
11 Paul Michels, M.D., and reviewing professional Mary Gentile, Ph.D.
12 She alleges the ALJ's credibility assessment is flawed. See Ct.
13 Rec. 19 at 10-14, 24 at 1-3 (opinion evidence); Ct. Rec. 19 at 1-
14 15, 24 at 3-4 (plaintiff's credibility).

15 Asserting the ALJ's decision is supported by substantial
16 evidence and free of legal error, the Commissioner asks the Court
17 to affirm (Ct. Rec. 14).

18 **DISCUSSION**

19 **A. Weighing medical evidence**

20 In social security proceedings, the claimant must prove the
21 existence of a physical or mental impairment by providing medical
22 evidence consisting of signs, symptoms, and laboratory findings;
23 the claimant's own statement of symptoms alone will not suffice.
24 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
25 on the basis of a medically determinable impairment which can be
26 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
27 medical evidence of an underlying impairment has been shown,
28 medical findings are not required to support the alleged severity

1 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
2 1991).

3 A treating physician's opinion is given special weight
4 because of familiarity with the claimant and the claimant's
5 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
6 1989). However, the treating physician's opinion is not
7 "necessarily conclusive as to either a physical condition or the
8 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
9 751 (9th Cir. 1989)(citations omitted). More weight is given to a
10 treating physician than an examining physician. *Lester v. Chater*,
11 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
12 given to the opinions of treating and examining physicians than to
13 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
14 (9th Cir. 2004). If the treating or examining physician's opinions
15 are not contradicted, they can be rejected only with clear and
16 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
17 ALJ may reject an opinion if he states specific, legitimate
18 reasons that are supported by substantial evidence. See *Flaten v.*
19 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir.
20 1995).

21 In addition to the testimony of a nonexamining medical
22 advisor, the ALJ must have other evidence to support a decision to
23 reject the opinion of a treating physician, such as laboratory
24 test results, contrary reports from examining physicians, and
25 testimony from the claimant that was inconsistent with the
26 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
27 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
28 Cir. 1995).

B. Mental impairment

Plaintiff alleges the ALJ failed to properly weigh the June 2009 opinion of examining psychologist Dr Pollack, as well as the December 2005 opinions of examining psychiatrist Dr. Michels and reviewing psychologist Dr. Gentile (Ct. Rec. 19 at 11-13; Tr. 242-258; 260-266). According to the Commissioner, the ALJ (1) properly rejected Dr. Pollack's opinion because it is based on plaintiff's unreliable self-report and unsupported by clinical evidence; (2) was not required to discuss evidence of no probative value, including the 2005 opinions rendered more than a year and a half before onset on July 6, 2007; (3) could find plaintiff's failure to allege disability based on a mental impairment¹ meant Ms. Scott did not consider it severe, and (4) relied on plaintiff's testimony mental health counseling has not been recommended (Ct. Rec. 23 at 11-14).

To further aid in weighing the conflicting medical evidence, the ALJ evaluated plaintiff's credibility and found her less than fully credible (Tr. 24). Credibility determinations bear on evaluations of medical evidence when an ALJ is presented with conflicting medical opinions or inconsistency between a claimant's subjective complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific

¹See e.g., Tr. 212 (plaintiff asserts she cannot work due to low back and knee pain); Tr. 221 (same).

1 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
2 1990). Once the claimant produces medical evidence of an
3 underlying medical impairment, the ALJ may not discredit testimony
4 as to the severity of an impairment because it is unsupported by
5 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
6 1998). Absent affirmative evidence of malingering, the ALJ's
7 reasons for rejecting the claimant's testimony must be "clear and
8 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
9 "General findings are insufficient: rather the ALJ must identify
10 what testimony not credible and what evidence undermines the
11 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
12 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

13 The ALJ gave several reasons for his credibility assessment,
14 including Ms. Scott's inconsistent statements, lack of medical
15 treatment, and activities inconsistent with claimed impairment
16 (Tr. 24-27).

17 Contrary to her complaints, on March 3, 2008, plaintiff's
18 single physical therapy session revealed she could sit for 15
19 minutes, frequently lift and carry a child less than a year old,
20 and ride a stationary bike for 10 minutes (Tr. 23, Exhibit 5F).
21 She was seen six days later in the emergency room. Notes reveal
22 "no deformity or tenderness. No CVA tenderness or percussion" (Tr.
23 23, Exhibit 15F/3). Subsequent ER visits show requests for pain
24 medication, refusing physical therapy, and [despite alleging being
25 "quite depressed"] good mental health presentation (Tr. 23, 261,
26 Exhibit 16F). Plaintiff states she was medically prescribed a
27 cane, but the evidence does not support her claim (Tr. 24). She
28 told Dr. Michels she does and does not have problems with focus

1 and concentration (Tr. 261).

2 The ALJ observes plaintiff's allegedly disabling pain is
3 undermined by her daily activities throughout the relevant period,
4 including caring for two young children, cooking, cleaning, doing
5 laundry, washing dishes, driving her son to school, shopping,
6 going out with friends, and visiting her son at school (Tr. 24;
7 Tr. 134-138). The ALJ's reason is clear, convincing, and supported
8 by substantial evidence. *See Rollins v. Massanari*, 261 F.3d 853,
9 857 (9th Cir. 2001).

10 The ALJ considered plaintiff's lack of mental health
11 treatment, failure to follow through with prescribed treatment
12 (including physical therapy), and lack of supporting objective
13 medical evidence when he assessed her credibility. At the December
14 2005 evaluation, Dr. Michels notes plaintiff was not receiving
15 mental health treatment (Tr. 258). A treatment provider observes
16 plaintiff only went to physical therapy twice and did not seek
17 treatment for an unexplained seven month period (Tr. 378-379,
18 381). Unexplained, or inadequately explained, failure to seek
19 treatment or follow a prescribed course of treatment is a relevant
20 factor when assessing credibility. *Fair v. Bowen*, 885 F.2d 597,
21 603 (9th Cir. 1989).

22 The ALJ's reasons for finding plaintiff less than fully
23 credible are clear, convincing, and fully supported by the record.
24 *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)
25 (proper factors include inconsistencies in plaintiff's statements,
26 inconsistencies between statements and conduct, and extent of
27 daily activities). As noted, noncompliance with medical care or
28 unexplained or inadequately explained reasons for failing to seek

1 medical treatment also cast doubt on a claimant's subjective
2 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair*, 885 F.2d at 603.

3 The ALJ failed to fully credit Dr. Pollack's contradicted
4 opinion in part because it is based on plaintiff's unreliable
5 self-report and lacks supporting clinical evidence (Tr. 20, 26,
6 Exhibit 17F). Dr. Pollack diagnosed a pain disorder associated
7 with both psychological factors and a general medical condition.
8 He notes complaints of major depressive disorder, recurrent and
9 moderate, and possible post traumatic stress disorder (PTSD) (Tr.
10 388-389). He assessed a GAF of 60 indicating some moderate
11 symptoms or difficulties in social, occupational or school
12 functioning². Dr. Pollack opined plaintiff is moderately limited
13 in the ability to perform activities within a schedule and
14 markedly limited in the ability to complete a normal workday (Tr.
15 391). Ms. Scott told Dr. Pollack she can drive for 30-45 minutes,
16 cares for her 21 month old daughter and 9 year old son, takes her
17 son to the bus stop daily, and picks him up if she is able (Tr.
18 384-386).

19 Dr. Pollack administered several tests. His assessed
20 limitations nonetheless appear based at least in part on
21 plaintiff's unreliable complaints. The ALJ notes the evidence does
22 not support ongoing problems caused by a pain disorder or
23 depression, including plaintiff's own statements she does not
24 suffer from a mental impairment (Tr. 20, 322 - denies depression,
25 November 6, 2007).

26 In addition, the ALJ notes treatment provider Art Flores,

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28 Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. at
p. 32(DSM IV)(2005).

1 PAC, concluded after examination in May 2008 both distraction and
2 overreaction "responses were suggestive to non-organic factors"
3 (Tr. 24, Exhibit 16F). More weight is given to a treating than an
4 examining source. See *Lester v. Chater*, 81 F.3d at 830 (9th Cir.
5 1995).

6 The ALJ's reasons are specific, legitimate and supported by
7 the record. An opinion of disability premised to a large extent on
8 the claimant's own accounts of his or her symptoms and limitations
9 may be disregarded, once those complaints have themselves been
10 properly discounted. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
11 Cir. 1995), citing *Flaten v. Secretary of Health & Human Services*,
12 44 F.3d 1453, 1463-1464 (9th Cir. 1995). When evaluating
13 conflicting opinions, an ALJ need not accept the opinion of a
14 doctor [or psychologist] if that opinion is brief, conclusory, and
15 inadequately supported by clinical findings. *Tonapetyan v. Halter*,
16 242 F.3d 1144, 1149 (9th Cir. 2001).

17 The ALJ was not required to discuss the 2005 opinions of Drs.
18 Michels and Gentile well before onset. The ALJ is required to
19 discuss probative evidence, that is, evidence pertaining to the
20 relevant time frame. See *Vincent v. Heckler*, 739 F.2d 1393, 1394-
21 1395 (9th Cir. 1984)(ALJ is only required to explain reasons for
22 rejecting significant probative evidence).

23 The ALJ properly weighed the evidence of Ms. Scott's mental
24 limitations as well as her credibility.

25 **C. Physical impairment**

26 Plaintiff alleges the ALJ should have found her more
27 physically limited. She offers no argument to support the
28 allegation. Her briefing is thus insufficient to raise a claim

1 with respect to physical limitations. See e.g., *Kohler v. Inter-*
2 *Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("bare
3 assertion of an issue does not preserve a claim").

4 The ALJ considered plaintiff's credibility when he weighed
5 the evidence of physical limitation. Notably, plaintiff did not
6 undergo physical therapy as directed (Tr. 378). The ALJ observes
7 plaintiff's complaints of chronic pain and weakness are not
8 supported by medically acceptable imaging, and the cane she uses
9 has not been medically prescribed or recommended (Tr. 24, 285).
10 Dr. Michels notes a July 2005 cervical x-ray is normal. A lumbar
11 MRI shows only mild central stenosis with small disk protrusions
12 (Tr. 260, 285). The ALJ points out an examination about four
13 months after onset, in November 2007, reveals normal strength and
14 range of motion on testing with "no significant or abnormal
15 findings." (Tr. 23, Exhibit 2F). In December 2007 Mr. Flores notes
16 he has not seen plaintiff in more than a year (Tr. 335). In March
17 3, 2008 she denies taking pain medication (Tr. 337).

18 While subjective pain testimony cannot be rejected solely on
19 the ground that it is not fully corroborated by objective medical
20 evidence, the medical evidence is still a relevant factor in
21 determining the severity of the claimant's pain and its disabling
22 effects. 20 C.F.R. § 404.1529(c)(2).

23 The ALJ is responsible for reviewing the evidence and
24 resolving conflicts or ambiguities in testimony. *Magallanes v.*
25 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
26 trier of fact, not this court, to resolve conflicts in evidence.
27 *Richardson*, 402 U.S. at 400. The court has a limited role in
28 determining whether the ALJ's decision is supported by substantial

1 evidence and may not substitute its own judgment for that of the
2 ALJ, even if it might justifiably have reached a different result
3 upon de novo review. 42 U.S.C. § 405 (g).

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this
6 court finds that the ALJ's decision is free of legal error and
7 supported by substantial evidence..

8 **IT IS ORDERED:**

9 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is
10 **GRANTED.**

11 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is
12 **DENIED.**

13 The District Court Executive is directed to file this Order,
14 provide copies to counsel, enter judgment in favor of defendant,
15 and **CLOSE** this file.

16 DATED this 4th day of January, 2011.

17 s/ James P. Hutton
18 JAMES P. HUTTON
19 UNITED STATES MAGISTRATE JUDGE
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